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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. ——

FEDERAL TRADE COMMISSION, PETITIONER

v.

TEXACO, INC., AND THE B. F. GOODRICH COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the Federal Trade Commission, petitions for a writ of certiorari to review the judgment of the Court of Appeals for the District of Columbia Circuit entered in the above case on July 30, 1964.

OPINIONS BELOW

The opinion of the Court of Appeals (App. 1a–27a) is not yet reported. The opinions of the Federal Trade Commission (JA 175–186 and JA 302–303)[1]

[1] JA refers to the printed joint appendix filed in the Court of Appeals. "JAX" refers to pages on which exhibits appear in the printed joint appendix. "CX" refers to Commission exhibits and "RX" to respondents' exhibits.

are not officially reported. The initial decision and the revised initial decision of the hearing examiner are reproduced at JA 153–171 and JA 200–233, respectively.

JURISDICTION

The judgment of the court of appeals (App. 29a–30a) was entered on July 30, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether it is an unfair method of competition, in violation of Section 5 of the Federal Trade Commission Act, for a major rubber company and a major oil company to enter into an agreement under which the oil company, in return for a commission, sponsors the sale of the rubber company's products to the oil company's retail dealers.

STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, provides, in pertinent part:

> Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful. * * * The Commission is empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

STATEMENT

This case involves the validity, under Section 5 of the Federal Trade Commission Act, of a so-called "sales commission plan" for the distribution of tires,

batteries and automotive accessories ("TBA") through the retail gasoline service stations of a major oil company, respondent Texaco, Inc. ("Texaco"). Texaco entered into similar agreements with respondent The B. F. Goodrich Co. ("Goodrich") and with the Firestone Tire and Rubber Company ("Firestone"), two major rubber companies, under which Texaco undertook to promote the sale of Goodrich and Firestone TBA to its dealers, and the latter companies agreed to pay Texaco a commission upon their sales of TBA to such dealers.[2] The Commission held that these arrangements for the distribution of TBA were unfair methods of competition and unfair acts and practices.

The Commission reached the same conclusion in two companion cases involving similar "sales commission plans" between major oil companies and large rubber companies. *Goodyear Tire & Rubber Co., et al.*, 58 F.T.C. 309; *Firestone Tire & Rubber Co., et al.*, 58 F.T.C. 371. Judicial review has been sought in the three cases. In the present case, the Court of Appeals for the District of Columbia Circuit set aside the Commission's order. In the *Goodyear* case, however, the Court of Appeals for the Seventh Circuit upheld the Commission's order. *The Goodyear Tire & Rubber Company, et al.* v. *Federal Trade Commission*, 331 F. 2d 394, pending on petitions for certiorari,

[2] Goodrich has similar sales commission arrangements with five other oil companies; only two of these arrangements are embodied in written contracts (J.A. 218–219).

Nos. 292 and 296, this Term. The third case, involving the Shell Oil Company and Firestone, has been argued before the Fifth Circuit and is awaiting decision.

1. The sales commission plan

Goodrich, one of the four largest rubber companies in the United States, manufactures a full line of tires, tubes and related products (JA 304). In addition, it purchases for resale batteries labeled "B. F. Goodrich," and a full line of non-rubber accessories which are sold under the manufacturers' nationally advertised brand names (JA 179–180, 217). In 1954, it distributed these products through almost 500 company-owned stores and through many independent dealers throughout the United States; its net sales in that year exceeded one-half billion dollars (JA 181–182, 218).

Texaco, whose 1954 sales were more than one and one-half billion dollars, is one of the nation's largest petroleum companies. It sells its petroleum products to approximately 31,000 service stations (JA 181).[3] Some of these dealers lease their stations directly from Texaco, usually initially for a single year, renewable thereafter on a year-to-year basis, and terminable at year's end upon ten days' notice by either party. Each lease contains general housekeeping requirements concerning the station's use, maintenance and general appearance which, if breached, can result

[3] Texaco sells its products directly to these stations and indirectly through approximately 700 wholesale distributors to 7,500 other outlets. Texaco's wholesale distributors either own bulk storage facilities or lease them from Texaco (JA 182).

in immediate cancellation by Texaco without notice to the lessee. Dealers in another category (the so-called "contract dealers") either own their own stations or lease them from third persons. These dealers lease pumps and other facilities from Texaco. Both categories of dealers enter into a gasoline "Agreement of Sale," which prescribes annual minimum and maximum purchases at current Texaco prices. The "Agreement of Sale" generally also runs initially for a year, then from year to year and terminable at year's end upon 30 days' notice; it is automatically cancelled if the lease of a dealer who leases his station from Texaco is terminated (JA 181–182, 204–207; JAX 22).

The Texaco-Goodrich agreement provides that in "consideration of the aid to be given and the services to be rendered by [Texaco's] sales organization in connection with promoting the sale of Goodrich products," Goodrich will pay Texaco a commission on all purchases of Goodrich TBA by consignees, dealers or distributors handling Texaco gasoline exclusively (JAX 8).[4] Texaco's agreement with Firestone has a similar provision (JAX 16–17).[5] In promoting sponsored TBA pursuant to these agreements, Texaco has

[4] The commission is 10 percent of the net value of all sponsored TBA purchased by Texaco retailers, and 7½ percent of the net value of all sponsored TBA purchased by Texaco wholesale distributors (JA 183, 207).

[5] Texaco stations are assigned to local Goodrich or Firestone distributors (sometimes to both), which act as supply points from which Texaco dealers purchase sponsored TBA. These purchases are reported to the appropriate TBA company, which then pays a sales commission to Texaco (JA 182–183).

done the following things, among others: (a) when interviewing prospective dealers Texaco has stressed the importance of TBA and recommended Goodrich and Firestone; (b) Texaco has notified Goodrich and Firestone when it has selected new dealers, has introduced these dealers to Goodrich or Firestone sales representatives and has assisted the dealers in setting up adequate TBA inventories;[6] (c) Texaco salesmen have acted as agents of Goodrich and Firestone in soliciting TBA orders from Texaco dealers;[7] (d) Texaco salesmen often have "double-teamed" with Goodrich or Firestone salesmen when calling on Texaco dealers; (e) Texaco has conducted frequent dealer meetings and has provided dealer training courses in which Goodrich and Firestone actively participated; (f) Texaco has included in its dealer magazines TBA merchandising suggestions, and has arranged and participated in Goodrich and Firestone TBA advertising and promotions; and (g) Texaco has permitted only Goodrich and Firestone TBA products to be purchased on its credit cards (JA 182–183, 208, 216–217).

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[6] Shortly before a new dealer is ready to commence operations, Texaco recommends that he purchase either Goodrich or Firestone TBA. Upon the dealer's choice of one of these companies, Texaco notifies the company by "nominating" the dealer for the company's "approved list" of TBA purchasers. (JA 373–375, 399–401, 504–505, 944, 1220, 1238, 1257–1258, 1568–1570). A nominated dealer is seldom rejected by the TBA company. Firestone, for example, accepted all of the 347 Texaco dealers nominated to it between 1954 and 1956 (JA 504–505).

[7] In fact, Texaco encourages its salesmen to write up orders for sponsored TBA without waiting for a formal request from a dealer (JA 208).

In 1955, Texaco's 31,000 service stations (see *supra*, p. 4) constituted approximately 16.5 percent of the country's total of more than 180,000 stations. (JA 181–182, 221, RX 86F). In the same year, approximately 127,000 stations in the United States sold tires and tubes; the 3567 Texaco stations purchasing Goodrich tires and tubes and the 6454 Texaco stations purchasing Firestone tires and tubes constituted approximately 5.5 percent of this market[8] (JA 220; CX 116, JAX 177, CX 117, JAX 178; RX 86K, JAX 624). In 1956, Goodrich and Firestone sold more than $58 million of TBA to all Texaco accounts (JA 185, 209) and paid commissions to Texaco on these sales of more than $5.4 million. During the five-year period between 1952 and 1956, Goodrich and Firestone sold more than $245 million of TBA to all Texaco accounts, and paid commissions to Texaco of more than $21 million (JA 210).

2. The proceedings below

After extensive hearings, the examiner held (JA 153–171) on October 23, 1959, that Texaco had violated Section 5 by coercing a substantial number of its dealers to purchase substantial quantities of sponsored TBA. He ruled, however, that Goodrich had not participated in these coercive practices, and dismissed the complaint as against it (JA 169–171). On cross-appeals, the Commission held that although the record indicated that Texaco had coerced its dealers

[8] The record does not show the total number of stations in the United States that carry all TBA items.

to purchase sponsored TBA, "Texaco has sufficient economic power over its wholesale and retail petroleum distributors to cause them to purchase substantial amounts of sponsored TBA even without the use of overt coercive tactics" (JA 178). The Commission concluded that the Texaco-Goodrich arrangement created "the possibility of serious potential threats to competition" (JA 185). The Commission held (JA 186), however, that the record did not contain "sufficient market data" to enable it "to assess the competitive effects of the sales commission method of distributing TBA employed by these respondents," and remanded the case to the examiner to take further evidence on this point (JA 174, 186).[9]

After receiving further evidence, the examiner issued a revised initial decision (JA 200–233), in which he held that both respondents had engaged in unfair methods of competition and unfair acts and practices by participating in the sales commission arrangements for distribution of TBA through Texaco's dealers. The examiner concluded that, without coercing its dealers, Texaco had sufficient economic power over them to cause them to purchase substantial amounts of sponsored TBA (JA 226). He held that the sales commission method of TBA distribution was designed to take advantage of Texaco's economic control over its dealers; that this method of distribution enabled Goodrich to "obtain an unfair advantage over its com-

[9] On the day the instant case was remanded, the Commission issued its decisions and final orders in the *Atlantic-Goodyear* (58 F.T.C. 309) and *Shell-Firestone* (58 F.T.C. 371) cases. See *supra*, p. 3.

petitors in selling to Texaco stations" and aided Texaco in "removing from the open market" a substantial number of Texaco dealers by causing them to purchase Goodrich TBA exclusively or in substantial quantities (JA 226–227). The examiner found that Texaco dealers had a "feeling or understanding, that they were required to purchase [sponsored] TBA"; that Texaco's recommendation "carried with it an implication" that Texaco dealers were required to purchase Goodrich or Firestone TBA and resulted in the exclusion of the TBA of those companies' competitors; and that the sales of Goodrich TBA to Texaco stations had increased substantially between 1952 and 1956 (JA 226–228). The examiner proposed a cease-and-desist order prohibiting both Texaco and Goodrich from participating in any sales commission program of TBA distribution (JA 230–233).

On appeal, the Commission adopted the examiner's decision and order with a minor modification,[10] stating that "the legal principles relevant to this decision need not be reexamined here because they are set forth at length in *Goodyear Tire & Rubber Co., et al.* [58

[10] In response to the respondents' contention that the Commission's evidence was improperly admitted on remand, the Commission stated that it placed no reliance on the challenged evidence (J.A. 302). It held that "the other evidence of record amply supports" the examiner's "conclusions and order" (*ibid*). The Commission struck three findings of fact and one conclusion of the examiner (JA 303). Only one member of the Commission who participated in the prior decision to remand the case to the examiner (Commissioner Anderson) was a member of the Commission when the second decision was rendered; he dissented from that decision on the ground that the remand order had not been complied with (JA 302).

F.T.C. 309], and *Firestone Tire & Rubber Co., et al.* [58 F.T.C. 371]" (JA 302–303).

The Court of Appeals for the District of Columbia Circuit set aside the Commission's order and remanded the case with instructions to dismiss the complaint (App. 1a–18a). The court held, first, that Chairman Dixon was disqualified from participating in the decision because he had indicated in a speech made while the case was pending that he had prejudged it (App. 8a–11a). The majority (Judges Miller and Burger) held, further, that a remand for reconsideration without the participation of Chairman Dixon would not be appropriate because the Commission's order was "not supported by substantial evidence on the record as a whole" (App. 11a). The court found "no basis in the record for the Commission's conclusion that Texaco had controlling economic power over its dealers" (App. 15a). Stating that a sales commission plan may be unlawful "in instances where an oil marketing company forces its dealers through coercive tactics or controlling economic power to buy the sponsored products," the court concluded that "[n]either of those influences was proved in this case" (App. 17a).

Judge Washington, although agreeing that Chairman Dixon was disqualified (App. 18a-20a), believed that, without passing on the merits, the court should have remanded the case for a fuller statement of the Commission's reasoning (App. 20a-23a). Since the majority had reached the merits, however, Judge Washington indicated his view that "under the anti-

trust laws, Texaco's relationship with its dealers must probably be deemed inherently coercive" (App. 24a). He further stated that the record as a whole might well support findings of "both the existence and the utilization of coercive economic power by Texaco over its dealers," and also might contain "sufficient evidence of anti-competitive effect to warrant finding a violation under a tie-in theory" (App. 26a).

Although we believe that the court of appeals erred in holding that Chairman Dixon was disqualified from participating in the decision of this case, we are not seeking review of that ruling. The ruling turns largely upon the facts of the particular case and apparently lays down no general rule barring the members of administrative agencies from explaining their policies to the public. Thus, the issue does not appear of sufficient general importance to warrant asking this Court to review it. If the Court agrees with us on the merits, therefore, the case will have to be remanded to the Commission for reconsideration without the participation of Chairman Dixon.

REASONS FOR GRANTING THE WRIT

This is one of three companion cases in which the Commission held that the use of a "sales commission plan" by a major oil company and a large rubber company calling for the oil company to sponsor distribution of the rubber company's TBA through the oil company's retail dealers violated Section 5 of the Federal Trade Commission Act. The decision of the

court below setting aside the Commission's order in this case conflicts in basic approach and rationale with the decision of the Seventh Circuit in *The Goodyear Tire & Rubber Company* v. *Federal Trade Commission,* 331 F. 2d 394, which condemned a substantially identical sales plan involving another major oil company (The Atlantic Refining Company) and another large tire company. The companies in the *Goodyear* case have sought review of that decision here, and the government has joined with them in urging the Court to hear the case. Memorandum for the Federal Trade Commission, Nos. 292 and 296, this Term. Even if the cases could be distinguished on their facts, the conflict, if unresolved, would create an anomalous situation in which one major oil company and a large tire company were permitted to employ essentially the same marketing practice that their competitors were prohibited from using.

1. Although the court of appeals' decision in the present case purportedly rests on the lack of substantial evidence to support the Commission's findings (App. 11a, 15a, 17a), it actually reflects a completely different approach than that taken by the Seventh Circuit in *Goodyear* to a fundamental issue in both cases—the nature and effect of a major oil company's economic power over its dealers. The cornerstone of the Commission's decision in the present case was its finding (made both in its first decision and in the examiner's revised decision which it adopted) that "Texaco has sufficient economic power over its wholesale and retail petroleum distributors to cause them to purchase substantial amounts of TBA *even without*

the use of overt coercive tactics" (JA 178, 226, emphasis added). In holding (App. 15a) that there was "no basis in the record" for this conclusion, the court below stated (*ibid.*) that "[t]he contracts with the dealers do not give rise to it."[11] In the *Goodyear* case, however, the Seventh Circuit, in agreeing with the Commission that The Atlantic Refining Company had controlling economic power over its dealers, noted that the "keystone" of their relationship was "the lease and the equipment loan contract with their short term and cancellation provisions" (331 F. 2d at 400). Similarly, although in the present case the court below stated (App. 16a) that

> An oil marketing company's recommendation to its dealers that they purchase a particular line of TBA, even though it receives a commission for doing so, is not incompatible with its primary business of selling petroleum products [,][12]

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[11] The court below erroneously stated: "The Commission did not reject its examiner's statement that no inference can be drawn from the contracts between Texaco and its dealers that the former has sufficient economic power over the latter to force them to purchase only sponsored TBA" (App. 14a). Such a statement was made by the examiner only in his first initial decision (JA 169). The Commission rejected this theory in its first decision, since it held that "Texaco has sufficient economic power over its wholesale and retail petroleum distributors to cause them to purchase substantial amounts of sponsored TBA even without the use of overt coercive tactics" (JA 178). In his revised decision, which the Commission adopted, the examiner followed the Commission's decision and held that Texaco had such controlling economic power over its dealers (JA 226).

[12] The court below stressed (App. 14a–15a) that Texaco had an "announced policy" that it would only "recommend" spon-

the Seventh Circuit in *Goodyear* recognized (331 F. 2d at 401) that because of the dealers'

> * * * economic dependency upon the oil company * * * recommendation is tantamount to command.

The two courts, in short, have a fundamentally different conception of the nature of economic power in the oil industry, and the different results in the two cases do not reflect merely the courts' respective evaluations of the different records. The District of Columbia Circuit apparently believes that, despite the tremendous disparity between the economic power of the oil company and an individual dealer and the complete dependence of the latter for his very existence upon the goodwill of the former (see below, pp. 16–17), the dealers are in fact "independent businessmen" whose purchases of TBA the oil company cannot be said to control "without the use of coercive tactics" (App. 15a). In determining the effect of the "sales commission plan" upon competition in the sale and distribution of TBA, therefore, the court below focussed upon the narrow issue whether Texaco took

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sored TBA to its dealers, but not attempt to control their decision whether to purchase the recommended brands. But, as developed in the text (see *infra*, pp. 16–19), such "recommendations" are, in view of the relationship between the oil company and the dealer, the equivalent of a command. Moreover, despite this alleged policy, the Commission found that a number of Texaco salesmen in fact had coerced Texaco dealers to stop purchasing TBA of companies other than Goodrich and Firestone (JA 210–215, 226), and that, in addition, certain Texaco dealers had the clear understanding that they were required to purchase their TBA from those companies (JA 227).

explicit coercive steps to compel its dealers to handle Goodrich and Firestone TBA. The Seventh Circuit, on the other hand, recognized the realities of the oil business that a "service station dealer is more of an economic serf than a businessman," who cannot exercise a free choice when the oil company "suggests" or "urges" him to handle the particular brand of TBA that the company is sponsoring. 331 F. 2d at 400. As it pointed out (*id.* at 401):

> Atlantic's power to cause its dealers to carry either Goodyear or Firestone TBA does not depend upon overt coercive methods. The totality of facts surrounding the relationship between the oil company and the dealers points to one conclusion: the oil company is able to exert sufficient economic power over its dealers so that for all practical purposes they are required to carry sponsored TBA.[13]

2. The Commission correctly held that the "sales commission plan" for the distribution of Goodrich and Firestone TBA through the Texaco dealers constituted an unfair method of competition and an unfair act and practice under Section 5 of the Federal Trade Commission Act. The basic vice of the plan is that it amounts to an illegal tying arrangement under which Texaco requires its dealers, as a condition of maintaining that status, to purchase Goodrich and

[13] The economic dependency of the dealers upon the oil company was also recognized in *Lessig* v. *Tidewater Oil Co.*, 327 F. 2d 459, 470 (C.A. 9), certiorari denied, 377 U.S. 993; *Osborn* v. *Sinclair Refining Company*, 286 F. 2d 832, 835–837 (C.A. 4), certiorari denied, 366 U.S. 963.

Firestone TBA. The relationship between Texaco and its dealers gives Texaco the power to compel them to purchase the TBA; and the sales commission agreement between Texaco and the rubber company not only obligates the oil company to use that power, but gives it the strongest possible motive for doing so—the substantial commission which it receives on all Goodrich and Firestone TBA sales to its dealers.

a. The Commission properly found (JA 178, 276) that "Texaco has sufficient economic power over its * * * retail petroleum distributors to cause them to purchase substantial amounts of sponsored TBA * * *." As the Seventh Circuit pointed out in the *Goodyear* case (331 F. 2d at 400), the "keystone of the actual relationship between [the oil company] and its dealers is the lease and the equipment loan contract with their short term and cancellation provisions." The leases of the service stations themselves, and of the equipment necessary to operate them, both are on a year-to-year basis. Texaco may cancel them for various reasons, including such a vague standard as the failure of a station lessee to comply with "specifications when deemed necessary in [Texaco's] opinion" (JAX 155). Additional factors that make Texaco's service station operators particularly sensitive to the company's wishes and reluctant to disregard them are Texaco's power to limit the supply of gasoline, subject only to the minimum requirements in the Agreement of Sale;[14] the substan-

[14] As Mr. Justice Jackson pointed out "[n]o retailer * * * can * * * remain in business if he does not always, and not just intermittently, have gas to sell" (*Standard Oil Co. v. United States*, 337 U.S. 293, 323).

tial investment which Texaco dealers make in their stations and the fact that Texaco may have advanced funds therefor (JA 367, 384–385, 1930); and the Texaco policy of assigning TBA quotas to its dealers, the meeting of which "is a strong point in renewing leases" (JA 728; CX31, 47; JAX 49, 78).

In the face of this and other similar evidence in the record, it blinks at reality to say, as the court below did (App. 15a), that Texaco does not have "controlling economic power over its dealers." "Words of advice seemingly innocent and perhaps benevolent, may restrain, when uttered under circumstances that make advice equivalent to demand"; "[t]he essence of restraint is power, and power may arise merely out of position." (*American Column & Lumber Co.* v. *United States*, 257 U.S. 377, 414). As Judge Washington pointed out (App. 24a–25a), there is not only substantial evidence "which might tend to show coercive power in this case" and which indicates that "Texaco imposed a course of purchasing behavior on its dealers," but "under the antitrust laws, Texaco's relationship to its dealers must properly be deemed inherently coercive." Indeed, this Court itself has recognized the disproportionate power of the major oil companies vis-à-vis their dealers, and the critical role of short-term leases in maintaining that power. *Simpson* v. *Union Oil Co.*, 377 U.S. 13, 14–15, 17; *Standard Oil Co.* v. *United States*, 337 U.S. 293, 296.

b. In view of the controlling economic power which Texaco has over its dealers, the Commission was fully warranted in holding that the sales commission plan

for distributing TBA through those dealers violates Section 5 of the Federal Trade Commission Act. If Texaco by express agreement or overt coercion had required its dealers to purchase Goodrich and Firestone TBA as a condition of obtaining Texaco gasoline, there would be no doubt that such tying arrangements, covering a substantial share of the market (see below, p. 19), would violate Section 1 of the Sherman Act and Section 3 of the Clayton Act.[15] The sales commission agreements with Goodrich and Firestone were responsible for Texaco's exercise of its power to compel its dealers to buy those companies' TBA. Pursuant to its contractual agreements with those companies to promote the sale of their products, Texaco took a number of steps designed to induce and require its dealers to purchase the particular brands of TBA on which Texaco received a commission. See the Statement, *supra*, pp. 5–6.

These sales commission agreements thus produce the traditional evils which have often led this Court to condemn tying arrangements as violating the antitrust laws: "[T]hey may force buyers into giving up the purchase of substitutes for the tied product * * * and they may destroy the free access of competing suppliers of the tied products to the consuming market * * *" (*United States* v. *Loew's Inc.*,

[15] *Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594; *United States* v. *Loew's Inc.*, 371 U.S. 38; *United States* v. *Richfield Oil Corp.*, 99 F. Supp. 280 (S.D. Cal.), affirmed, 343 U.S. 922; *Osborn* v. *Sinclair Refining Company*, 286 F. 2d 832, 836–837 (C.A. 4), certiorari denied, 366 U.S. 963; *United States* v. *Sun Oil Company*, 176 F. Supp. 714 (E.D. Pa.).

371 U.S. 38, 45). Texaco had sufficient economic power over its dealers "so that for all practical purposes they are required to carry sponsored TBA" (*The Goodyear Tire and Rubber Company, et al.* v. *Federal Trade Commission*, 331 F. 2d at 401) (C.A. 7). The effect of the sales commission plans is to foreclose a substantial segment of the TBA market to competing sellers of those products. In 1956, for example, Texaco dealers purchased almost $60 million of Goodrich and Firestone TBA; based upon Texaco's own estimate that total national TBA sales in service stations were $800 million (JA 180), the sales commission agreement foreclosed more than 7½ percent of this market. A tying arrangement that forecloses so substantial a segment of the market plainly would violate the antitrust laws.[16]

In giving the Commission in Section 5 authority to prohibit "unfair methods of competition" and "unfair acts and practices," Congress gave the agency a

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[16] Cf. *Standard Oil Co.* v. *United States*, 337 U.S. 293, 295 (exclusive dealing contracts held illegal where Standard Oil accounted for 13.5 percent of retail gasoline sales in a six-state area); *United States* v. *Loew's Inc.*, 371 U.S. 38, 49 (25 tying contracts of six companies, involving $60,000 to $2,500,000, held illegal); *International Salt Company* v. *United States*, 332 U.S. 392, 395 (tying agreement held illegal where $500,000 of commerce was involved annually); *United States* v. *Richfield Oil Co.*, 99 F. Supp. 280, 285–86 (S.D. Cal.), affirmed, 343 U.S. 922 (tying agreement held illegal where $3,600,000 of TBA was involved). Nor does a tie-in escape condemnation because the buyer is not required to obtain all his requirements of the tied product from the seller; it is the economic effect of a tying arrangement and not the degree of exclusivity that is critical. *Osborn* v. *Sinclair Refining Company*, 286 F. 2d 832, 838 (C.A. 4), certiorari denied, 366 U.S. 963.

latitude of flexibility within which it could restrain any new scheme which the ingenuity of competitors could devise. S. Rep. No. 597, 63d Cong., 2d Sess., 13 (1914); *Federal Trade Commission* v. *Raladam*, 316 U.S. 149, 152; *Federal Trade Commission* v. *Motion Picture Advertising Service Co., Inc.*, 344 U.S. 392, 393–395. Section 5 covers not only violations of the Sherman and Clayton Acts, but also conduct which "runs counter to the public policy declared" in those Acts (*Fashion Originators' Guild* v. *Federal Trade Commission*, 312 U.S. 457, 463). It was intended "to stop in their incipiency acts and practices which when full blown, would violate those Acts" (*Motion Picture Advertising, supra*, at 394–395).

The sales commission method of distributing TBA is "a tying arrangement inherently anticompetitive * * * [under which] competition for the business of the individual service station is replaced by competition for the oil company's domination of its dealers" (*The Goodyear Tire & Rubber Co., et al.* v. *Federal Trade Commission*, 331 F. 2d 394, 403 (C.A. 7)). It constitutes an "imposed tie-in" whose "perniciousness * * * is aggravated by the fact that the [oil company] is not even in the business of selling the tied products, but is employing its economic power in the gasoline industry to force [its] dealers to do business with a supplier in another industry * * * that yields the [oil company] an extraneous revenue" (*Osborn* v. *Sinclair Refining Company*, 286 F. 2d 832, 839–840 (C.A. 4), certiorari denied, 366 U.S. 963). Its effect is that the oil company "farms out to another, for a price, its coercive economic power." *Id.* at 840. The Commission properly con-

cluded that a distribution system which has such serious anticompetitive effects violates Section 5 of the Federal Trade Commission Act.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 1964.

APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,915

TEXACO, INC., PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

No. 17,923

THE B. F. GOODRICH COMPANY, PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

Petitions to Review Order of the Federal Trade Commission

Decided July 30, 1964

Before WILBUR K. MILLER, WASHINGTON and BURGER, *Circuit Judges.*

WILBUR K. MILLER, *Circuit Judge:* Texaco, Inc. (formerly The Texas Company) and The B. F. Goodrich Company have filed separate petitions for review of an order of the Federal Trade Commission which was issued April 15, 1963, after proceedings which

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will be described. The cases were heard together and will be disposed of in a single opinion.

On January 11, 1956, after an investigation which began at least as early as 1952, the Federal Trade Commission issued a complaint against the petitioners charging them with violating Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by engaging in unfair methods of competition in interstate commerce. Specifically, the object of the Commission's attack was the implementation of a contract between the two companies, entered into in 1940, in which Texaco undertook, in return for a commission, to promote the sale of Goodrich tires, batteries and accessories (TBA) to its thousands of dealers in its petroleum products. It was alleged that Texaco has entered into a similar contract with Firestone Tire & Rubber Company.

The complaint stated that influence and control over the purchasing and marketing activities of its dealers has been and is being exercised by Texaco "by recommending, urging, persuading and causing them to purchase a substantial quantity of TBA products from Goodrich and Firestone, the sellers designated by it." The acts and practices of Goodrich and Texaco under the commission contract, the complaint said,

> ". . . have unduly frustrated, hindered, suppressed, lessened, restrained, prevented and eliminated competition in the sale of TBA products in commerce within the intent and meaning of the Federal Trade Commission Act; have the capacity and tendency to restrain unreasonably and have restrained unreasonably such commerce in said products; and constitute unfair methods of competition and unfair acts and practices, in commerce, within the intent and meaning of Section 5 of the Federal Trade Commission Act."

Essentially, the complaint was that Texaco coerces its dealers, through economic pressure, to distribute Goodrich TBA and thus unfairly and unlawfully prevents Goodrich's competitors from selling TBA to Texaco's outlets.

Answers by the companies placed the essential allegations of the complaint in issue, after which evidentiary hearings were conducted over a period of nearly three years. They were concluded December 10, 1958. The examiner, in his initial decision issued October 23, 1959, found that Goodrich had not done anything to force Texaco outlets to buy its products; that there was neither charge nor proof that Goodrich had conspired with Texaco to restrain competition; and that the commissions paid by it under the contract were for substantial services rendered by Texaco in promoting the sale of its products. Accordingly, the initial decision of October 23, 1959, dismissed the complaint against Goodrich.

With respect to Texaco, the examiner found that the contracts between Texaco and its dealers do not contain any provision requiring the latter to purchase only Goodrich TBA. He said the commission paid to Texaco by Goodrich is based on substantial services rendered by Texaco in promoting the sale of Goodrich TBA, and added:

> "No inference or implication can be drawn, simply from the contractual relationship between Texas and its dealers, that the degree of control by Texas over its dealers is sufficient to force its dealers to purchase only sponsored TBA."

The examiner found, however, that

> ". . . the record in this proceeding *as a whole* indicates that coercion and pressure was [*sic*], in fact, brought on *a substantial number*

> *of dealers* to induce them to purchase sponsored TBA and to discontinue the purchase or display of non-sponsored items."[1] (Emphasis supplied.)

Pursuant to this, the examiner's initial decision of October 23, 1959, ordered Texaco to cease and desist from coercing its dealers into purchasing TBA from any particular supplier.

In keeping with the deliberate progress of this proceeding, the Commission did not act on the initial decision of October 23, 1959, until March 9, 1961. On that day it handed down an opinion in which it not only reversed the examiner's dismissal of Goodrich but also found

> ". . . that Texaco had sufficient economic power over its wholesale and retail petroleum distributors to cause them to purchase substantial amounts of sponsored TBA even without the use of overt coercive tactics. . ."

Proceeding from its assumption that Texaco had controlling economic power over its dealers, "even without the use of overt coercive tactics," the Commission said:

> ". . . The determination of whether Texaco's exercise of such economic power in favor of Firestone and Goodyear under the oil company's sales commission contracts with these rubber companies constitutes an unfair method of competition depends, therefore, upon *the*

[1] This was a rather extraordinary conclusion in view of the fact that not one of Texaco's more than 38,000 dealers was called to testify before the examiner in support of the complaint. The examiner based the statement on the testimony of five former Texaco dealers who said they had been coerced, although five other former dealers and 54 active dealers called by Texaco said they had never been coerced or influenced in any way as to Goodrich TBA.

competitive effects of these sales commission contracts; not upon whether Texaco has exercised its power to implement such contracts through the use of overt coercive tactics, or by more subtle, but equally effective, means.

"At issue in this litigation, then, is the legality of a particular method of distributing TBA used by respondents. A key fact in evaluating the competitive effects of respondents' use of the sales commission method of distributing TBA is the fact that Texaco has sufficient economic power with respect to its retail and wholesale petroleum distributors to cause them to purchase substantial quantities of the brand of TBA sponsored or sold by Texaco. But such economic power is a fact existing independently of any particular method of distributing TBA which Texaco may use. Whether the sales commission agreements between Firestone and Texaco and Goodrich and Texaco are unlawful must depend, therefore, upon the characteristics and the competitive effects of these sales commission agreements. For reasons set forth hereinafter, we conclude that this case must be remanded in order that market data may be introduced to show the competitive effects of Texaco's sales commission agreements with Goodrich and Firestone upon competing suppliers of tires, batteries and accessories at the manufacturing, wholesale and retail levels."

Having thus concluded that the legality of the sales commission agreements depends upon the "characteristics[2] and the competitive effects" of the agreements, the Commission closed its opinion by saying:

"However, the record in this case does not contain sufficient market data to enable the

[2] The "characteristics" of the agreements were of course fully known to the Commission, which had before it their complete text.

> Commission to assess the competitive effects of the sales commission method of distributing TBA employed by these respondents. The case will be remanded to the hearing examiner for the taking of evidence indicating the competitive effects of the sales commission contracts at the manufacturing, wholesale and retail levels of TBA distribution."

More than a year after the remand of March 9, 1961,[3] the examiner conducted hearings from July 16 to July 19, 1962, at which the only proof introduced was in the form of exhibits received over the objection of the petitioners. A new initial decision was filed by the examiner September 24, 1962. In it he incorporated the findings of fact of his first initial decision and made additional findings of fact based on the record as supplemented after remand. The examiner noted that he was bound by the Commission's reversal of his dismissal of Goodrich, and by its finding that Texaco has sufficient economic power over its dealers to cause them to purchase substantial amounts of sponsored TBA, even without the use of coercive tactics. He conluded that

> ". . . the only issue left for consideration of the hearing examiner under the terms of the Commission's opinion and order of remand, is the competitive effects of the sales commission plan used by Goodrich with The Texas Company, and whether Texaco's exercise of such economic power in favor of Goodrich and Firestone under their sales commission contracts have sufficient competitive effect to constitute an unfair method of competition or an unfair act or practice."

[3] A part of this period was consumed in the petitioners' unsuccessful attempt to enjoin further hearings.

The examiner disposed of the "only issue left for [his] consideration" by concluding that

> "The use of the sales commission plan of distribution of TBA by the respondents, The Texas Company and The B. F. Goodrich Company as herein found, has atendency and capacity to restrict, restrain or lessen competition in the sale of TBA products and constitutes an unfair method of competition and an unfair act and practice in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act."

In obedience to the Commission's order on remand, the examiner abandoned his former position, held Goodrich as a respondent, and concluded:

> "The use of the sales commission method of distribution by Goodrich was designed to take advantage of the economic control which Texaco had over its dealers, and by such use, Goodrich was able to obtain an unfair advantage over its competitors in selling to Texaco stations and in addition, aided and abetted Texaco in removing from the open market a substantial number of new and established Texaco dealers by causing them to purchase Goodrich TBA exclusively or in substantial quantities, and thereby excluding competitors of Goodrich who might otherwise have been able to sell their TBA to a substantial number of such Texaco dealers."

Although he had the first time dismissed Goodrich, and had merely ordered Texaco to cease and desist from the coercive practices he had found from the testimony of five ex-dealers, this time the examiner entered a broad order as to both respondents. He ordered Texaco to cease and desist from entering into or continuing in effect any contract with Goodrich or any other rubber company or tire manufacturer, or

any other supplier of tires, batteries or accessories, by the terms of which Texaco receives anything of value in connection with the sale of TBA to its dealers. The examiner ordered Goodrich to cease and desist from operating under its contract with Texaco and prohibited it from entering into a similar contract with any other marketing oil company.

The order of remand of March 9, 1961, was entered by a Commission composed of Chairman Kintner and Commissioners Secrest, Anderson and Kern. Accompanying it was the opinion to which we have referred, written by Chairman Kintner and concurred in by the other three members of the Commission. Shortly thereafter—on March 21, 1961—Earl W. Kintner was replaced as Chairman by Paul Rand Dixon, who had not been a member of the Commission theretofore. One of the acts of the new Chairman when he had been in office only a short time led to the phase of the proceeding which we shall now consider.

On February 18, 1963, before the Commission had acted on the examiner's new initial decision of September 24, 1962, Texaco filed a motion that Chairman Dixon withdraw from participation in the proceeding or that the Commission determine him to be disqualified. The basis of the motion was a speech made by Dixon before the National Congress of Petroleum Retailers, Inc., in Denver, Colorado, on July 25, 1961, while the case was pending before the examiner after remand and before any steps had been taken by him. In the course of his address, according to a press release issued by the Commission itself, the then newly appointed Chairman of the Commission said:

> "Your problems are many, and many of them are the problems of the Federal Trade Commission, too; for the Commission is concerned with promoting fair competition. More par-

ticularly, many of your problems are ours because they arise from practices prohibited by two of the most important statutes administered by the Commission—discriminatory pricing, prohibited by the Robinson-Patman Act, and other unfair acts, practices, and methods of competition, prohibited by the Federal Trade Commission Act.

* * * * * *

"We at the Commission are well aware of the practices which plague you and we have challenged their legality in many important cases.

"You know the practices—price fixing, price discrimination, and overriding commissions on TBA.

"You know the companies—Atlantic, Texas, Pure, Shell, Sun, Standard of Indiana, American, Goodyear, Goodrich, and Firestone.

* * * * * *

"Some of these cases are still pending before the Commission; some have been decided by the Commission and are in the courts on appeal. You may be sure that the Commission will continue and, to the extent that increased funds and efficiency permit, will increase its efforts to promote fair competition in your industry."

The Commission denied the motion that it determine Chairman Dixon to be disqualified, and he declined to withdraw from participation. Instead, he took part in the entry of the order of April 15, 1963, more than two years after the remand, which adopted the examiner's initial decision and order of September 25, 1962, which as we have seen, was adverse to Texaco and Goodrich and which is now under review. Before turning to the question whether the order of April 15, 1963, was supported by the record, we consider the propriety of Chairman Dixon's participation in that decision.

In *Gilligan, Will & Co.* v. *Securities and Exchange Comm'n*, 267 F. (2d) 461 (1959), the Commission, three days after commencing proceedings, issued a press release stating in effect that Gilligan, Will & Co. and others had violated Section 5 of the Securities Act of 1933. Although the Second Circuit held that petitioners' failure to make timely objection had waived their right to assert the defect of prejudgment, the Court strongly disapproved of the Commission's behavior. It said, at pages 468-9:

> "* * * [T]he Commission's reputation for objectivity and impartiality is opened to challenge by the adoption of a procedure from which a disinterested observer may conclude that it has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it. * * *".

In this case, a disinterested reader of Chairman Dixon's speech could hardly fail to conclude that he had in some measure decided in advance that Texaco had violated the Act.

We said in *Amos Treat & Co.* v. *Securities and Exchange Comm'n*, 113 U.S. App. D.C. 100, 107, 306 F. (2d) 260, 267 (1962):

> ". . . [A]n administrative hearing of such importance and vast potential consequences must be attended, not only with every element of fairness but with the very appearance of complete fairness. Only thus can the tribunal conducting a quasi-adjudicatory proceeding meet the basic requirement of due process."

The administrative hearing in the present case was certainly as important as that in the *Amos Treat* case, and has perhaps even greater potential consequences. We conclude that Chairman Dixon's participation in the hearing amounted in the circumstances to a denial

of due process which invalidated the order under review. If that were the only infirmity in the order, we should be constrained to remand the cases to the Commission for a *de novo* consideration in which Chairman Dixon does not take part. His Denver speech, made before the matter was submitted to the Commission but while it was before the examiner, plainly reveals that he had already concluded that Texaco and Goodrich were violating the Act, and that he would protect the petroleum retailers from such abuses.

But that is not all. The Supreme Court has said that in reviewing the substantiality of the evidence we must consider all the evidence including "the body of evidence opposed to the Board's view." *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474, 487–8 (1951). Viewed in this way we are convinced that the order of April 15, 1963, is not supported by substantial evidence on the record as a whole. The order under review, as we have said, adopted the examiner's initial decision and order of September 24, 1962, after slight modification. In it, the Commission said:

> "Respondents contend that the tables, surveys, and matters officially noticed by the examiner on remand were improperly admitted both because they are inappropriate objects for official notice and because respondents were afforded inadequate opportunity to rebut them.
>
> "It is not necessary to pass upon the correctness of these contentions, since the Commission excludes from its present decision any reliance upon the challenged evidence. It finds that the other evidence of record amply supports the conclusions and the order of the hearing examiner. The legal principles relevant to this decision need not be reexamined here because they are set forth at length in the opinions of the Commission in *Goodyear Tire & Rubber Co., et*

al., Docket 6486, March 9, 1961, and *Firestone Tire & Rubber Co., et al.*, Docket 6487, March 9, 1961. . . ."[4]

Thus, in its consideration of the revised initial decision and order, the Commission expressly disclaimed any reliance upon the evidence introduced after remand and held that the evidence or record before the remand "amply supports the conclusions and order of the hearing examiner." This was the same record which the Commission on March 9, 1961, had said "does not contain sufficient market data to enable the Commission to assess the competitive effects of the sales commission method of distributing TBA employed by these respondents."

But, in successfully resisting an action in the District Court by Texaco and Goodrich to enjoin the remand, the new Commission contended that it "needed additional evidence in order to decide the issues presented." It asserted that the opinion of March 9, 1961, ordering the remand showed that the Commission "is not seeking a retrial of matters already tried but rather envisions supplementary evidence on what it considered to be significant facts in any assessment of the competitive effects of the sales commission agreements. . . ."

Despite these representations, the Commission on April 15, 1963, contrary to the former Commission's determination that the record did not justify such a finding, found the petitioners in violation of Section 5 of the Federal Trade Commission Act on the basis of that record. It adopted the examiner's revised

[4] It is perhaps not without significance that Commissioner Anderson, the only member of the Commission as constituted on April 15, 1963, who had participated in the remand of March 9, 1961, did not concur "for the reason that the command of the remand order of March 9, 1961, has not been met and complied with . . ."

order which prohibited Goodrich from entering into sales commission agreements with Texaco or any other marketing oil company, and prohibited Texaco from entering into such agreements with Goodrich or any other rubber company or tire manufacturer, or any other supplier of tires, batteries or accessories.

The new Commission placed itself in an anomalous position: first, it vigorously asserted (as the former Commission had held when it remanded the proceeding) that it could not find against the petitioners without additional evidence as to the competitive effects of the sales commission contracts; then, it decided that same issue against the petitioners without any consideration of the record made after remand, and without repudiating or even commenting upon its confessed inability to reach that issue previously.

Although the two Commissions reached diametrically opposite conclusions from the same record as to whether unfair competition had been shown, both based their action upon their conclusion that

> "Texaco has sufficient economic power over its wholesale and retail petroleum distributors to cause them to purchase substantial amounts of sponsored TBA *even without the use of overt coercive tactics. . . .*"[5] (Emphasis supplied.)

[5] Although the examiner concluded in his first initial decision that the record "as a whole" indicated coercion had been brought on "a substantial number of dealers" (five former dealers out of many thousands of former and active dealers), the remanding Commission apparently did not regard such meager proof as convincing, for it expressly discarded it as a basis of decision, and concluded as stated in the text above that Texaco had controlling economic power over its dealers without the use of coercive tactics.

The examiner's first initial decision had not so concluded, but the remaining Commission's conclusion as to Texaco's economic

But neither Commission referred to any evidence in support of this finding, and neither made any finding of fact which would sustain a conclusion that Texaco had such economic power over its dealers, and we are unable to see substantial evidence on the record as a whole to sustain that conclusion. The Commission did not reject its examiner's statement that no inference can be drawn from the contracts between Texaco and its dealers that the former has sufficient economic power over the latter to force them to purchase only sponsored TBA. And it did not say (for there was no proof from which it could conclude) that Texaco's treatment of its dealers and their reaction indicated that Texaco had, or had attempted to exercise, the controlling economic power over its dealers that the Commission found. Indeed, the examiner found as a fact that Texaco's policy, announced to all its salesmen as long ago as June 1, 1948, is that it has neither the right nor the desire to dictate to the dealer or to influence him in any way as to the type of merchandise he should handle, or the source from which he should purchase it.[4] This finding was adopted by the Commission.

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power was parroted by him in his initial decision after remand. He added thereto the following sentence selected from another portion of the remanding Commission's opinion: "Such economic power exists independent of any particular method of distributing TBA which Texaco might use." This new conclusion was adopted by the Commission in its decision of April 15, 1963. Consequently, both Commissions concluded that Texaco had controlling economic power without the use of coercive tactics.

[4] Finding of Fact No. 8 in the examiner's post-remand initial decision is as follows:

"As a result of an antitrust suit filed against Standard Oil Company of California, Walter Hochuli, General Sales Manager of The Texas Company, on June 1, 1948, issued a so-called policy letter to the territorial man-

Consequently, we find no basis in the record for the Commission's conclusion that Texaco has controlling economic power over its dealers. The contracts with the dealers do not give rise to it, and it is the announced policy of Texaco to respect the independence of its dealers; as the evidence overwhelmingly shows, its practice has followed its policy. The mere fact that Texaco is a giant corporation and the dealers are in the main small businessmen cannot be said to demonstrate controlling economic power over the latter, particularly when, as here, the evidence is to the contrary. We hold, therefore, that the Commission erred in concluding that Texaco has sufficient economic power over its dealers, without the use of coercive tactics, to cause them to buy substantial quantities of Goodrich TBA. We have already noted that the Commission did not find coercive tactics had been used, and that the record as a whole demonstrates the contrary.

From its unwarranted assumption that Texaco had such economic power, the Commission proceeded to the conclusion that the question whether the exercise of that power in Goodrich's behalf amounts to an unfair method of competition depends on the "competitive effects" of the sales commission agreements. It

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agers, which was subsequently disseminated down the chain of command to salesmen. This letter advised the personnel that they were to consider a Texaco dealer as an independent businessman; that he should be encouraged to expand his business by purchasing TBA; that the personnel have a right to recommend certain lines, but that Texas has neither the right nor the desire to dictate to the dealer or to influence him in any way as to the type of merchandise he should handle, or the source from which he should purchase it; that the Texaco dealer must be permitted to operate as an independent businessman and anyone who violates this policy would be subject to immediate dismissal."

said that Texaco's controlling economic power is a "key fact" in evaluating the competitive effects of the sales commission contracts. Thus, the Commission itself said that the supposed need to examine the "competitive effects" was due entirely to its conclusion that Texaco not only had, but exercised, controlling economic power over its dealers without using coercive tactics. This conclusion was indeed the keystone of the Commission's ultimate decision, without which it cannot stand. That being true, our holding that there is not a substantial evidentiary basis in the record for the Commission's assumption that Texaco had and exercised coercive economic power causes its conclusion based thereon to collapse.

The Commission's sweeping order not only condemned the Texaco-Goodrich contract but also held illegal any sales commission arrangement between an oil marketing company and a TBA supplier. This either attributes to all such oil companies inherent controlling economic power over their dealers, or implies there is basic illegality in such arrangements. Our view is that, in any case, there must be substantial evidence on the whole record of the supposed economic power of the oil marketing company before a prohibiting order can be based upon it. As to the implication that sales commission agreements between oil companies and TBA suppliers are basically illegal regardless of their terms, we disagree. There is no reason to condemn such contracts unless they result in unfair competition. An oil marketing company's recommendation to its dealers that they purchase a particular line of TBA, even though it receives a commission for doing so, is not incompatible with its primary business of selling petroleum products. The dealers, at least in the situation here involved, are quite free to accept or reject the recommendation, and to handle

a different line if they think it would be more acceptable to their customers.

The Commission's broad order prohibited contracts for sponsorship of TBA sales to oil marketing company dealers only when the company receives compensation for the sponsorship. The vice found by the Commission in the arrangement seems therefore to be the payment of commissions. Yet the Commission adopted the findings of the examiner which described in detail the services performed by Texaco under its contract with Goodrich and also adopted his conclusions that

> "The consideration for the payment of a commission to Texas under the sales commission contract is based upon substantial services rendered by Texas in promoting the sale of Goodrich TBA to Texaco dealers and distributors."

We see nothing illegal or even unethical in the payment of commissions for such services, except in instances where an oil marketing company forces its dealers through coercive tactics or controlling economic power to buy the sponsored products. Neither of those influences was proved in this case, and it may not be presumed that either will exist in future similar situations.

After four years of preliminary investigation followed by eight years of litigation, including the remand for additional evidence said to have been necessary but never used, the Commission has not been able to show illegality in the Texaco-Goodrich contract of 1940. During that long period, the companies necessarily have devoted much time and money to their defense. Although the Commission must be allowed considerable leeway in developing a record, its efforts in this case—fruitless after a dozen years—have exceeded permissible limits and have had unreasonably

harassing and oppressive effects upon the companies under attack. Because the Commission's drastic orders are not supported by the record as a whole and because of the undue protraction of the administrative process, we are of the opinion that this long drawn out proceeding should now be terminated. Accordingly, the order under review will be set aside, and the matter will be remanded to the Commission with instructions to dismiss the complaint.

It is so ordered.

WASHINGTON, *Circuit Judge, concurring in part and dissenting in part:*

I agree with the majority that Chairman Dixon's conduct disqualified him from participating in the Commission's order, and that the order must be set aside for that reason. I would not, however, dismiss the entire proceeding, either on the merits or because of the Commission's delays. I would remand for further consideration of the case by the Commission, without the participation of Chairman Dixon, and on a basis which I will outline later on.

I

With reference to Chairman Dixon's conduct, I would add only this. Federal Trade Commissioners, like other adjudicators, are entitled to hold and express views on the laws they are charged with enforcing and applying. They "do not stand aloof on . . . chill and distant heights; and we shall not help the cause of truth by acting and speaking as if they do."[1] We do not equate impartiality with utter indifference. A judge does not deny litigants a fair hearing by sitting in a case "after he had expressed an opinion as to whether certain types of conduct

[1] CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 168 (1921).

were prohibited by law."[2] We do not expect a Trade Commissioner to be neutral on anti-monopoly policies.

A fair hearing is denied, however, if the administrative judge, prior to examining the evidence and findings, has indicated his belief that named individuals or firms are violating the statute, and the "guilt" or "innocence" of such parties depends on certain factual findings which are in dispute. Once an adjudicator has taken a position apparently inconsistent with an ability to judge the facts fairly, subsequent protestations of open-mindedness on his part cannot restore a presumption of impartiality. Whether justice was in fact done is not the issue; an administrative hearing "must be attended, not only with every element of fairness but with the very appearance of complete fairness."[3] We must presume that a fair hearing was denied[4] if a disinterested observer would have reason to believe that the Commissioner had "in some measure adjudged the facts . . . . of a particular case in advance of hearing it."[5]

Chairman Dixon's speech leaves a clear impression that his belief that petitioners had violated the Act was far stronger than the "reason to believe" which

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[2] *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683 at 703 (1948).

[3] *Amos Treat & Co.* v. *Securities and Exchange Commission*, 113 U.S. App. D.C. 100, 107, 306 F. 2d 260, 267 (1962).

[4] "[J]ustice must satisfy the appearance of justice." *Offutt* v. *United States*, 348 U.S. 11, 14 (1954).

[5] *Gilligan, Will and Co.* v. *Securities and Exchange Commission*, 267 F. 2d 461, 469 (2d Cir. 1959). In that case the Securities and Exchange Commission, three days after commencing adjudicatory proceedings, had issued a press release, stating that the parties involved had violated the relevant Act. The Second Circuit, in dicta, strongly disapproved of the Commission's behavior, but held that petitioners had waived their right to object by failing to make a timely motion.

justifies the issuance of a complaint. Indeed, his speech suggests not only a substantial conviction that Texaco and Goodrich are violating the Act but an implied promise to support the petroleum retailers in their struggle against alleged abuses by their suppliers. An independent observer could fairly conclude that Chairman Dixon was in some measure pre-committed to a determination adverse to petitioners. We must therefore—at the least—vacate the Commission's order and remand to the Commission for a de novo consideration of the record and the arguments without the participation of Chairman Dixon.[6]

II

The Absence of Reviewable Findings

The Commission's decision consisted of an assertion that the "other evidence of record[7] amply supports the conclusions and the order of the Hearing Examiner. The legal principles relevant to this decision need not be reexamined here because they are set forth at length in the opinions of the Commission in *Goodyear Tire & Rubber Co.* * * * and *Firestone Tire & Rubber Co.* * * *"

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[6] *Federal Trade Commission* v. *Cement Institute*, *supra*, is to be distinguished on the grounds that (a) the disqualification of the entire Commission, which was there sought, would have effectively precluded any enforcement of the Act against the respondent (the "necessity doctrine"), and (b) the opinion does not indicate that the Commissioners had expressed a focussed bias against the respondent, rather a general "policy" bias against basing point systems.

[7] That is, exclusive of certain evidence adduced in the remand proceeding, which petitioners claimed was improperly admitted, and which the Commission in fact stated that it would not consider.

Section 8(b) of the Administrative Procedure Act, 5 U.S.C. § 1007(b) (1958), provides in part that all decisions "shall * * * include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record * * *." Recently, the Supreme Court set aside an order of the Interstate Commerce Commission, partly on the ground that—

> "There are no findings and no analysis here to justify the choice made, no indication of the basis on which the Commission exercised its expert discretion. We are not prepared to and the Administrative Procedure Act will not permit us to accept such adjudicatory practice."[8]

The mere citation of earlier opinions does not provide a sufficient basis to understand and evaluate the Commission's decision on the facts of this case. There are a variety of facts and findings relied on by the Commission in the *Goodyear* and *Firestone* cases which cannot be readily assumed here. For example, on the issue of coercion, in *Goodyear* the Commission found that "Atlantic dealers have been orally advised by sales officials of the oil company that their continued status as Atlantic dealers and lessees will be in jeopardy if they do not purchase sufficient quantities of sponsored TBA."[9] In *Firestone* the Commission pointed to internal memoranda of the Shell Oil Company to support the conclusion of coercion. In both cases the Commission purported to make an examination of the competitive effects of the sales commission plan, saying, "Determination of illegality in this context requires an evaluation of competitive

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[8] *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 167 (1962).

[9] 58 F.T.C. 309, 342 (1961).

effects resulting from respondents' use of the sales commission method of distributing TBA,"[10] and, in pursuing an alternative theory of a tie-in arrangement, purported to make findings on Atlantic's and Shell's economic power in the "tying" commodity.

Also to be noted is the fact that on the same day that the Commission decided *Goodyear* and *Firestone*—March 9, 1961—it considered this case, and did not affirm the findings of actual coercion but remanded to the Examiner for the taking of further evidence on "competitive effects":

> "[T]he record in this case does not contain sufficient *market data* to enable the Commission to assess the competitive effects of the sales commission method of distributing TBA employed by these respondents."[11] (Emphasis supplied.)

On April 15, 1963, the Commission, reviewing the Hearing Examiner's remand decision, affirmed his conclusions of a statutory violation, even though it excluded from consideration any new evidence adduced on the remand, and cited the *Goodyear* and *Firestone* cases, even though the Commission had previously declined to find a violation on this record, when it remanded simultaneously with its formulation and ap-

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[10] *Firestone*, 58 F.T.C. 371, 408 (1961); *Goodyear*, *supra* at 365. *E.g.*, Shell accounted for about 5% of the total gasoline sold at retail in the United States in 1955, 58 F.T.C. at 407; Firestone accounted for 15.3% and Goodyear 21.4% of total replacement tire sales at consumer level in 1954. 58 F.T.C. at 409.

[11] In *Goodyear* and *Firestone* the Commission considered such "competitive effects" as division of markets between manufacturers, foreclosure of battery and accessory manufacturers, foreclosure of smaller tire manufacturers, restraint on expansion of smaller tire manufacturers' distribution systems, foreclosure of wholesalers, preemption in favor of wholesalers selling sponsored products, and the impact on wholesalers who also sell at retail.

plication of legal theories in the companion cases. The one Commissioner who had participated in the earlier decision and was on the Commission on April 15, 1963, dissented from the decision rendered on that date.

These considerations indicate, not that the evidence, as a whole, fails to support a finding of a Section 5 violation under a proper interpretation of that section, but that the Commission failed to perform its function of articulating the facts and spelling out its theories. The Commission's decision falls short of the standards required for judicial review, for we are unable to discern with a fair degree of certainty the facts or the theories relied on below.[12] Under the circumstances, we should express no opinion on the merits.

In my view, we should hold simply that a court must know why a Commission acted in order to fulfill the function of judicial review (*Secretary of Agriculture* v. *United States*, 347 U.S. 645 (1954)), and that businessmen and other parties subject to administrative regulation are entitled to an explanation of their duties and obligations. Thus, even in the absence of the disqualification issue, we would—in my view—find it necessary to remand for a proper opinion. See *Radio Station KFH Co.* v. *Federal Communications Commission*, 101 U.S. App. D.C. 164, 247 F. 2d 570 (1957).

For the reasons given, I would set aside the Commission's order but would pass neither on the merits nor on other issues argued by the parties. The Commission could then be required to produce a new opinion within a reasonable time, such as sixty days, meeting the standard for judicial review.

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[12] See *e.g.*, *Interstate Commerce Commission* v. *Mechling*, 330 U.S. 567 (1947); *Connecticut Light & Power Co.* v. *Federal Power Commission*, 324 U.S. 515, 532 (1945).

III

Though, as I have indicated, I do not think we should pass on the merits, the majority has done so. Under the circumstances, I am constrained to say that in my view the majority's conclusion that the record does not contain sufficient evidence to support a finding of a Section 5 violation is very doubtful. The crucial failing, in the court's view, is the lack of evidence to establish that Texaco has sufficient economic power over its dealers to compel them to handle Goodrich tires exclusively. I submit that under the antitrust laws, Texaco's relationship to its dealers must probably be deemed inherently coercive. See, e.g., *Simpson* v. *Union Oil Company of California*,—— U.S.——(April 20, 1964); *Standard Oil Company of California* v. *United States*, 337 U.S. 293 (opinion for the Court per Frankfurter, J.), 323 (concurring opinion of Jackson, J.) (1949); *Federal Trade Commission* v. *Motion Picture Advertising Service Co.*, 344 U.S. at 402 (1953) (Frankfurter, J., in dissent, explaining his opinion in *Standard Stations, supra*); *Osborn* v. *Sinclair Refining Co.*, 286 F. 2d 832 (4th Cir. 1961); *United States* v. *Sun Oil Co.*, 176 F. Supp. 715, 719–20 (E.D. Pa. 1959); *Schwing Motor Co.* v *Hudson Sales Corp.*, 138 F. Supp. 899 (D. Md. 1956); *United States* v. *General Motors Corp.*, 121 F.2d 376, 398 (7th Cir.), cert. denied, 314 U.S. 618 (1941). See, also, the recent opinion of the Seventh Circuit in *Goodyear, Tire & Rubber Co.* v. *Federal Trade Commission*, —— F. 2d ——, ——, (April 24, 1964). See, generally, S. Rep. No. 2073, 84th Cong., 2d Sess. (1956); H.R. Rep. No. 2850, 84th Cong. 2d Sess. (1956), relating to the Automobile Dealers' Franchise Act, 70 Stat. 1125, 15 U.S.C. § 1221.

Evidence which might tend to show coercive power in this case includes (a) one year leases and sales

agreements, terminable at the year's end upon 10 days' notice; (b) substantial contractual control by Texaco over the use, maintenance and appearance of stations (the obligations imposed by Texaco, in addition to being evidence of Texaco's bargaining power, are means by which Texaco could prematurely terminate the lease through enforcement of one of those obligations, under cancellation provisions); (c) high personal investments by the lessees in their stations; (d) close dealer supervision by Texaco salesmen; (e) Goodrich's manifest understanding that Texaco controls its dealers (e.g., Goodrich's books refer to the dealers as "oil company controlled dealers"); (f) testimony of competing TBA suppliers that Texaco dealers felt they risked reprisal if they did not carry sponsored TBA, and (g) testimony of former Texaco dealers of the existence of a pattern of coercive conduct throughout their tenure. Other evidence in the record that Texaco imposed a course of purchasing behavior on the dealers may be summarized by quoting from page 51 of Respondent's brief:

> ". . . the services performed by Texaco pursuant to its contracts include: Stressing the importance of TBA to *prospective* dealers and recommending BFG and Firestone; giving advance notice of dealer selection to BFG or Firestone and introducing new dealers to their salesmen; assisting new dealers with adequate TBA inventories; encouraging its salesmen to write sponsored TBA orders without awaiting formal dealer request; calling on dealers with BFG or Firestone salesmen ('double teaming'); conducting frequent dealer meetings and training courses, with active BFG and Firestone participation; arranging for and participating in BFG and Firestone advertising and promotions; and permitting sponsored TBA purchases on its credit cards. Texaco training schools are conducted at company-owned serv-

ice stations where only BFG or Firestone TBA is used. This can only solidify the dealer's 'choice' of sponsored TBA."

Thus, I suggest that it may well be the record as a whole would support findings of both the existence and the utilization of coercive economic power by Texaco over its dealers. Were we reviewing the Hearing Examiner's findings, and formulating the appropriate legal theory in the first instance, I suggest that we might also properly conclude that there was sufficient evidence of anti-competitive effect to warrant finding a violation under a tie-in theory.[13] But in the first instance it is the Commission, not this court, which must indicate what facts and what legal theories constrained it to find a violation. We could of course select those legal doctrines appearing in the cases cited in the Commission's opinion—*Goodyear*

[13] On the appropriate test of anti-competitive effect necessary to sustain a finding that a tie-in violates Section 1 of the Sherman Act (which generally puts a more stringent burden on the Government than does Section 5 of the FTC Act), see, *e.g.*, *Northern Pacific Railway Co.* v. *United States*, 356 U.S. 1 at 5–6 (1958). The percentage of the gasoline station market for TBA controlled by Texaco, on any reading of the record, certainly affects a "not insubstantial" amount of interstate commerce. *See International Salt Co.* v. *United States*, 332 U.S. 392 (1947), and *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 330 (1962).

On utilization of a tie-in theory under circumstances similar to those of the instant case, see *Osborn* v. *Sinclair Refining Co.*, *supra*, 286 F. 2d 832 (4th Cir. 1961). The fact that Texaco's power and practices resulted in something less than exclusive dealer use of sponsored TBA would not seem to require a different result. *Id.* at 838–39. See, also, the decision of the Seventh Circuit, in an appeal from a parallel decision of the Federal Trade Commission relied on below, *Goodyear Tire & Rubber Co.* v. *Federal Trade Commission*, —— F. 2d —— (April 24, 1964).

and *Firestone*—and those facts in the record before the Hearing Examiner, which would sustain the Commission's conclusions, and then affirm. But aside from the fact that such an approach would be less than faithful to the appropriate institutional relationship between this court and the Commission, it would not be possible in this case because of Chairman Dixon's disqualifying conduct.

The delays in this case are serious.[14] But I would not terminate the proceedings because of them. The public interest in effective competition should not lightly be subordinated to Texaco's interest in speedy adjudication.

[14] See, generally, *Note, Judicial Acceleration of the Administrative Process; The Right to Relief from Unduly Protracted Proceedings*, 72 YALE L.J. 574 (1963).

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,915

TEXACO, INC., PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

No. 17,923

THE B. F. GOODRICH COMPANY, PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

On Petitioners to Review an Order of the Federal Trade Commission

Before: WILBUR K. MILLER, WASHINGTON and BURGER, Circuit Judges

JUDGMENT

These cases came on to be heard on the record from the Federal Trade Commission, and were argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this court that the order of the Federal Trade Commission on review in these cases is set aside, and the matter is hereby remanded to the Fed-

eral Trade Commission with instructions to dismiss the complaint.

Per Circuit Judge WILBUR K. MILLER.

Dated: July 30, 1964.

Separate opinion by Circuit Judge Washington concurring in part and dissenting in part.

A true Copy,

Test:

NATHAN J. PAULSON,
Clerk of the United States Court of Appeals
for the District of Columbia Circuit.

U.S. GOVERNMENT PRINTING OFFICE: 1964